IN THE

Supreme Court of the United States

No. 77-1810 OCTOBER TERM, 1978

ARIZONA PUBLIC SERVICE COMPANY, EL PASO ELECTRIC COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, SOUTHERN CALIFORNIA EDISON COMPANY, and TUSCON GAS & ELECTRIC COMPANY,

Appellants,

v.

ARTHUR B. SNEAD, Director of the Revenue Division of the Taxation and Revenue Department, REVENUE DIVISION OF THE TAXATION AND REVENUE DEPARTMENT, and STATE OF NEW MEXICO

Appellees.

On Appeal From The Supreme Court of New Mexico

BRIEF OF AMICI CURIAE IN SUPPORT OF JURISDICTIONAL STATEMENT

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INTEREST OF AMICI CURIAE

The State of New York, the State of New Jersey, and the State of Maryland are interested in this matter because it involves the interpretation of Federal Constitutional provisions and of an Act of Congress (15 U.S.C. § 391) as they apply to state taxation of electric generation and transmission, which interpretation might be controlling with respect to a tax imposed by the Commonwealth of Pennsylvania (Act No. 1977-100) on gross receipts from electric energy generated in Pennsylvania and sold at retail in, *inter alia,* New York, New Jersey and Maryland.

ARGUMENT

The purpose of this filing is to present to the Court facts which clearly indicate that the instant appeal warrants plenary consideration by this Court in order to resolve substantial questions concerning the validity, interpretation and application of Section 2121(a) of the Tax Reform Act of 1976 (15 U.S.C. § 391) and the ability of one state to raise revenue by imposing a tax on or with respect to electric energy, which tax is borne only by consumers outside the taxing state.

On December 21, 1977, Pennsylvania enacted Act No. 1977-100 (Appendix G to the Jurisdictional Statement) which extended Pennsylvania's gross receipts tax on electric companies to include a levy on gross receipts from sales of electric energy produced in Pennsylvania and made outside Pennsylvania.*

Neighboring states, recognizing that the burden of this new Pennsylvania tax would fall exclusively on their consumer residents, responded.

In New York, under the provisions of the Niagara Redevelopment Act, the Power Authority of the State of New York is required to make available to public bodies and non-profit cooperatives located in neighboring States up to 20 percent of the so-called "preference power" generated by the Niagara Power Project. 16 U.S.C. § 836(b)(2).

For many years Allegheny Electric Cooperative, Inc. ("Allegheny"), a Pennsylvania-based electric cooperative, had received power from the Niagara Power Project under this provision. In early 1978, a replacement of an expiring contract with Allegheny was submitted to Governor Hugh L. Carey of New York for his approval, as required by applicable state law. On February 3, 1978,

* There is presently an action pending in the Commonwealth Court of Pennsylvania, styled *Baltimore Gas and Electric Company, et al.* v. *Milt Lopus, Secretary of Revenue of the Commonwealth of Pennsylvania, et al.*, and docketed to No. 643 Commonwealth Docket, 1978, in which Act No. 1977-100 is challenged.

Governor Carey disapproved the renewal contract, stating, *inter alia:*

> Of all the States interested in purchasing Niagara Power, New York's average cost of electricity to residential consumers is the highest. *That burden has worsened by Pennsylvania's recent action imposing a gross receipts tax on electricity generated in the state and sold to New York residents.*
>
> The people of this State made possible the construction of the Niagara Power Project. Residential consumers in this State pay the highest electric power costs in the nation, but they receive a disproportionately small amount of Niagara power. My first commitment is, as it must be, to the citizens of New York State. Under the present circumstances, I have no choice but to remand the contracts to the Authority for consideration of the issue of what amount of Niagara power constitutes a "reasonable portion" to be available to our neighbor states. (Emphasis supplied).

The full text of Governor Carey's statement is attached as Appendix A hereto.

In New Jersey, on June 22, 1978, Bill No. 1525 was introduced in the General Assembly of the State of New Jersey. This bill seeks to impose a tax on gross receipts received from sales of electric energy produced in New Jersey and made outside New Jersey. The proposed tax is patterned after the Pennsylvania tax, and the bill provides that the act shall remain in effect "only as long as Public Law 340 (Act 100 of 1977) of the Commonwealth of Pennsylvania or comparable legislation remains in effect." A copy of Bill No. 1525 is attached as Appendix B hereto.

The Court has recognized the temptation on the part of the officials of one state to craft a scheme which im-

poses burdens on out-of-state residents without any adverse impact on the local electorate. The Court, has, for example, declined to grant special deference to state action having an impact on interstate commerce where the questioned state action does not fall "on local economic interests as well as other States' economic interests, thus insuring that a State's own political processes will serve as a check against unduly burdensome" state action. *Raymond Motor Trans. Inc.* v. *Rice,* 46 U.S.L.W. 4109, 4113 n.18 (February 21, 1978).**

Unless this Court continues to subject such clever and attractive schemes to close scrutiny, and to give full effect to relief legislation, such as § 2121 of the Tax Reform Act, obtained from the Congress through the national political process, the States adversely affected will have no choice but to respond with countervailing economic measures, thus Balkanizing the national economy.

In their Jurisdictional Statement, appellants quote the remarks of Senator Fannin during debate on the "Domenici Amendment" which would have stricken the provision that was to become § 2121 of the Tax Reform Act; Senator Fannin stated: "We are talking about what could happen all over the United States. We are talking about a potential taxing war on the sale of power which could be devastating." 122 Cong. Rec. S12713 (daily ed. July 28, 1976).

The general importance of the issues presented in this appeal and the reality of the threat to which Senator Fannin and the United States Congress spoke is evidenced by the recent experience of Pennsylvania, New York and New Jersey.

** The various allegedly "equivalent tax schemes" cited by appellees in support of the decision below (Motion to Dismiss or Affirm, page 18) all would have a noticeable effect on New Mexico residents; that fact may well account for New Mexico's decision to reject such schemes.

CONCLUSION

For the reasons set forth above, probable jurisdiction should be noted in this matter.

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APPENDIX A

STATEMENT BY GOVERNOR HUGH L. CAREY
On Contracts for the Sale of
Power From Niagara Power Project

Allegheny Electric Cooperative, Inc.
Public Service Board of the State of Vermont

There are before me for approval or disapproval two contracts for the sale of power from the Niagara Power Project of the Power Authority of the State of New York. These contracts have been negotiated by the Authority pursuant to the provisions of the Niagara Redevelopment Act, 16 U.S.C. Sec. 836, which require one-half of the power generated at the Niagara Project to be made available for the consumers, giving preference to public bodies and nonprofit coooperatives. Of this 50 percent reserve, a reasonable portion of the power—up to 20 percent—must be made available in neighboring states.

The proposed contracts would allocate 110 megawatts of firm power and 20 megawatts of firm peaking power to Allegheny Electric Cooperative, Inc., a Pennsylvania-based electric cooperative, and 40 megawatts of firm power and 10 megawatts of firm peaking power to the Public Service Board of the State of Vermont. These contracts, which would expire on June 30, 1985, would replace existing contracts with Allegheny and Vermont which expire on February 19, 1978, and December 31, 1979, respectively.

In anticipation of the expiration of the existing contracts, the Authority solicited applications from the states bordering New York for the Niagara Project power which would be coming available. Applications were submitted by the Massachusetts Municipal Wholesale Electric Company (Massachusetts), the Connecticut Municipal Electric Energy Cooperative (Connecticut), American Municipal Power-Ohio, Inc. (AMP-Ohio) and the Borough of Lansdale, Pennsylvania, (Lansdale), as well as Allegheny and Vermont. Because of the limited amount of Niagara hydro power available for out-of-state sales, the Authority was required to determine what amounts of the low-cost power should be allocated to which of New York's neighbor states.

From the evidence before it, the Authority concluded that AMP-Ohio and Lansdale were not qualified recipients, since among other considerations, neither entity had concluded the arrangements necessary for wheeling the power. The Authority also determined that the potential savings which would be realized by Allegheny, Massachusetts and Vermont (24.5, 21.0 and 24.3 mills per kilowatt-hour respectively) from the purchase of Niagara power would be roughly comparable, while the savings which would be achieved by Connecticut would be considerably less (13.7 mills per kilowatt-hour) than that of the other applicants. In contrast, rural and residential consumers in the south-eastern region of this State would save approximately 32 mills per kilowatt-hour if the power were allocated for their use. Yet, under the present allocations of Niagara power, Vermont, in 1976, received 5.96 megawatt-hours per rural and residential customer; and New York received a mere 1.91 megawatt-hours per rural and residential customer. Proposed allocations would change those ratios only marginally. Of all the States interested in purchasing Niagara power, New York's average cost of electricity to residential consumers is the highest. That burden has worsened by Pennsylvania's recent action imposing a gross receipts tax on electricity generated in the state and sold to New York residents.

The people of this State made possible the construction of the Niagara Power Project. Residential consumers in this State pay the highest electric power costs in the nation, but they receive a disproportionately small amount of Niagara power. My first commitment is, as it must be,

to the citizens of New York State. Under the present circumstances, I have no choice but to remand the contracts to the Authority for consideration of the issue of what amount of Niagara power constitutes a "reasonable portion" to be available to our neighbor states. The State of New York will, of course, continue to work closely with its sister states to establish regional mechanisms which ensure an adequate supply of energy at reasonable rates.

The contracts are disapproved.

HUGH L. CAREY

February 3, 1978

APPENDIX B

ASSEMBLY, No. 1525

STATE OF NEW JERSEY

INTRODUCED JUNE 22, 1978

By Assemblymen GEWERTZ, GORMAN, RAND, NEWMAN, SCHUCK, DOYLE, Assemblywoman CROCE, and Assemblyman HERMAN

Referred to Committee on Taxation

AN ACT providing for the taxation of gross receipts derived from the sale of electric energy produced in the State and sold out of State, providing for the establishing of a Utility Rate Stabilization Fund and the paying of subsidies to utility companies to reduce utility rate increases caused by the taxation of the sale of electric energy in New Jersey by other states.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. As used in this act "electric light company, water power company and hydroelectric company" means any company organized or to be organized pursuant to the laws of any state for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric light, heat or power.

2. a. Every electric light company, water power company and hydroelectric company now or hereafter incorporated or organized by or under any law of this State, or now or hereafter organized or incorporated by any

other state or by the United States or any foreign government and doing business in this State, and every limited partnership, association, joint-stock association, copartnership, person or persons, engaged in electric light and power business, water power business and hydroelectric business in this State, shall pay to the State Treasurer, through the Division of Taxation, a tax of $0.03 upon each dollar of the gross receipts of the corporation, company or association, limited partnership, joint-stock association copartnership, person or persons, received from the sales of electric energy produced in New Jersey and made outside of New Jersey according to the following apportionment formula. The gross receipts from all sales of electricity of the producer shall be apportioned to the State of New Jersey by the ratio of the producer's operating and maintenance expenses in New Jersey and depreciation attributable to property in New Jersey to the producer's total operating and maintenance expenses and depreciation.

b. Payment of Tax; Reports. The said taxes imposed under subsection (a) shall be paid within the time prescribed by law, and for the purpose of ascertaining the amount of the same, it shall be the duty of the treasurer or other proper officer of the said company, copartnership, limited partnership, association, joint-stock association or corporation, or person or persons, to transmit to the Division of Taxation on or before April 15 of each year an annual report, and under oath or affirmation, of the amount of gross receipts of the said companies, copartnerships, corporations, associations, joint-stock associations, limited partnerships, person or persons, derived from all sources, and of gross receipts from business done wholly within this State and in the case of electric energy producers that transmit energy to other states, a compilation of the relevant information regarding operating and

maintenance expenses and depreciation, during the period of 12 months immediately preceding January 1 of each year. It shall be the further duty of the treasurer or other proper officer of every such corporation or association and every individual liable by law to report or pay said taxes imposed under subsection a. except municipalities to transmit to the Division of Taxation on or before April 30 of each year, a tentative report in like form and manner for each 12-month period beginning January 1, of each year. The tentative report shall set forth (i) the amount of gross receipts received in the period of 12 months next preceding and reported in the annual report; or (ii) the gross receipts received in the first 3 months of the current period of 12 months; and (iii) such other information as the Division of Taxation may require.

c. Tax computation. Upon the date its tentative report is required to be made, for the year 1978 and each year thereafter the corporation, association or individual making a tentative report shall transmit such report to the Division of Taxation on account of the tax due for the current period of 12 months and compute and make payment of the tentative tax with such report.

d. Time to file reports. The time for filing annual reports may be extended, estimated settlements may be made by the Division of Taxation if reports are not filed, and the penalties for failing to file reports and pay the taxes imposed under subsection (a) shall be as prescribed by the laws defining the powers and duties of the Division of Taxation. In any case where the works of any corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons are operated by another corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons, the taxes imposed under subsection (a) shall be apportioned between the corporation, compa-

nies, copartnerships, associations, joint-stock associations, limited partnerships, person or persons in accordance with the terms of their respective leases or agreements, but for the payment of the said taxes the State shall first look to the corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons operating the works, and upon payment by the said company, corporation, copartnership, association, joint-stock association, limited partnership, person or persons of a tax upon the receipts, as herein provided, derived from the operation thereof, no other corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons shall be held liable for any tax imposed under subsection (a) upon the proportion of said receipts received by said corporation, company, copartnership, association, joint-stock association, limited partnership, person or persons for the use of said works.

e. Application to municipalities. This act shall be construed to apply to municipalities, and to impose a tax upon the gross receipts derived from any municipality owned or operated public utility or from any public utility service furnished by any municipality, except that gross receipts shall be exempt from the tax, to the extent that such gross receipts are derived from business done inside the limits of the municipality, owning or operating the public utility or furnishing the public utility service.

3. The revenue collected by the Division of Taxation pursuant to this act shall be deposited with the State Treasurer in a special Utility Rate Stabilization Fund established by the treasurer.

4. a. Whenever any electric light company, water power company or hydroelectric company applies to the Board of Public Utilities for a rate increase based in whole or in part on an increase in costs resulting from

taxes paid to another state on the gross receipts from the sales of electricity produced in that state and sold in New Jersey, and the board verifies the authenticity of said increased costs, said company may apply to the State Treasurer for payment of a subsidy to offset such increased costs in whole or in part and shall be granted such subsidy from the Utility Rate Stabilization Fund in such percentage as the treasurer determines is equitable and as the amount deposited in the fund shall allow. The treasurer, after consultation with the Board of Public Utilities, may adopt appropriate regulations or take other necessary actions to insure that revenues provided from the fund are utilized for rate relief.

b. The amount of rate increase requested by any electric light company, water power company or hydroelectric company based on an increase in costs due in whole or in part to an increase in taxes or set forth in subsection a. of this section shall be denied or reduced in direct proportion as the subsidy paid pursuant to subsection a. offsets the increase in costs resulting from the tax increase.

5. Any company subject to the gross receipts tax imposed by this act may deduct from their tax liability under this act, taxes they have paid on their gross receipts, within the same tax period, pursuant to P. L. 1940, c. 4 (C. 54:30A-16 et seq.) and P. L. 1940, c. 5 (C. 54:30A-49 et seq.)

6. This act shall take effect on the first day of the month following enactment and shall remain in effect only as long as Public Law 340 (Act 100 of 1977) of the Commonwealth of Pennsylvania or comparable legislation remains in effect.

STATEMENT

The Commonwealth of Pennsylvania recently imposed a tax on gross receipts of utility companies based on the sale of electricity produced in Pennsylvania but sold out of the State. It is estimated that Pennsylvania will realize $10,000,000.00 in tax receipts from this tax based on sales of electricity in New Jersey. Utility companies are expected to increase their rates to New Jersey consumers in such amount as it is necessary to offset their $10,000,000.00 tax increase.

This bill imposes a gross receipts tax on electricity produce in New Jersey and sold out of state. The revenue derived from this tax will be deposited in a Utility Rate Stabilization Fund and used to alleviate utility rate increases based on out of state gross receipt taxes. The legislation is made expressly contingent upon the continuance of the Pennsylvania tax.